Filed in Open Court June 7, 1954
Martin Mongan, Clerk
By C. Wall, Deputy Clerk

APPENDIX "A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 423147

MARCOS GONZALES, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, *et al., Respondents.*

Memorandum of Decision

This Court has made its order that a Writ of Mandate directing and compelling respondents to restore to petitioner all of his rights and privileges in respondent associations and to reinstate petitioner as a member in good standing thereof without payment of any fine or the statement of any apology to the Respondent Truax or to any other person, and has ordered judgment for damages, upon the ground and for the reason that petitioner was deprived of his said rights, duties and membership in an illegal manner.

In arriving at its decision this Court is not unmindful of the following general propositions of law which are applicable to labor unions and associations, to-wit: That the Charter of a subordinate lodge and the constitution and by-laws of the parent organization constitute the contract between the lodge and the parent organization; that the subordinate lodge constitution and by-laws constitute a contract between the lodge and its members; that the rights and duties of members, the conditions of membership, and the gaining and losing of membership are limited and must be measured by the terms of the contract; and that a member of associations of this type must first exhaust the rights afforded him by the tribunals of the

association before he may seek redress from the courts. (Smitherham v. Laundry Workers Union, 44 CA (2d) 131; Bush v. International Alliance, 55 CA (2d) 457; McConville v. Milk Union, 106 Cal. App. 696).

It is likewise settled law, however, that once a person has acquired the personal right of membership under such a contract he cannot be deprived of it except upon a strict observance of the proceedings prescribed for its termination in the constitution or by-laws of the association of which he is a member; and that where such an association has violated its own laws and regulations and has arbitrarily violated a members property rights the member need not exhaust his remedies within the organization before resort is had to the courts. (Dinguvall v. Amalgamated Association, 4 CA 565; Weber v. Marine Cooks, 93 CA (2d) 327; Harris v. National Union, 98 CA (2d) 733; Cason v. Glass Bottle Blowers, 37 Cal. (2d) 134).

Aside from the question as to whether or not Article XXV, Section 1, of the Grand Lodge Constitution was effective at the time the petitioner made the allegedly false and malicious statements reflecting upon the private and/or public conduct of respondent Truax, it appearing that the said statements were contained in a complaint for damages for assault and battery filed in the Superior Court of the City and County of San Francisco, filed on March 9, 1949, and it further appearing that said Article XXV, Section 1, became effective April 1, 1949, (upon a revision of a previous Constitution which may have contained similar provisions) we are of the opinion that there was sufficient evidence before the association to support the conclusion of the Trial Committee that the petitioner had violated said provisions particularly in view of the fact that petitioner admitted before the Trial Committee, on July 7, 1950, that he had no proof or evidence that Truax had assaulted him or that he instructed or advised anyone else to do it. Conceding for the puposes of this decision that there was such a Constitutional provision in

effect at the time petitioner allegedly violated it, we are constrained—it not being the province of this Court to consider the weight of such evidence or to substitute our judgment thereon for that of Trial Committee before whom petitioner was tried—to hold that there was evidence to support its conclusion that petitioner was guilty of such violation.

The illegality of the proceedings appears after the Trial Committee submitted its report to the membership of the Lodge Article K of the Constitution for the Local Lodge specifically and in great detail sets forth the trial procedure and the voting upon said report. In Section 6 of Article K it is specifically provided that the "trial committee shall report at the next regular meeting", and the Trial Committee did so in this case. That article clearly indicates that the Trial Committee's recommendations are to be voted upon at this meeting. That procedure was followed in this case and the membership by secret ballot rejected the recommendation of the Trial Committee and in effect rendered a "Not Guilty" verdict. Thereafter, at the next meeting on August 2, 1950, and without any previous notice therefor, the membership rescinded its action of the previous meeting and concurred in the "guilty verdict" of the trial committee voted to expel petitioner. The only authority for this subsequent action is to be found in Rule 27 of Rules of Order of the Constitution for Local Lodges which provides: "All questions, *unless otherwise provided*, shall be decided in accordance with Robert's Rules of Order," (emphasis ours). It is our opinion that this action taken on August 2, 1950, is illegal. Although Roberts Rules of Order provide for the rescission of some action previously taken, they cannot, as said in Harris v. National Union, etc., 98 CA (2) 733, "change the plain requirement of the constitution nor convert by procedural slight of hand" the procedure which the constitution requires. Petitioner was acquitted under the specific provisions of Article K, the procedural provisions of

which, cannot be avoided by resort to Robert's Rules of Order. We are also of the opinion that even if it be conceded that the action of Aug. 2, 1950, was proper that the penalty of expulsion was illegal. Section 7 of Article K requires "a ⅔ vote *of those voting* to expel the defendant from membership" (emphasis ours). The vote was 29 yes, 14 noes and 1 blank. Forty-four persons voted on the question of the Trial Committee's recommendation of expulsion. A ⅔rds vote required 30 to vote for expulsion. Merely because one person declined to vote either for or against expulsion is no indication that he was not voting. It may be reasoned that by declining to vote either for or against expulsion he was exercising his right to indicate that he was in favor of some form of punishment other than that recommended by the committee as contemplated in Section 7 of Article K.

Although petitioner could then have sought redress to the courts, he chose to appeal to the International President as provided by the Grand Lodge Constitution. The International President should have reversed the decision of August 2, 1950; on the grounds that the same was illegal. Instead he affirmed the finding of "guilty" but modified the penalty to a $500.00 fine and an apology. In this regard it should be pointed out that the only penalty provided for the offense herein charged is "fine or expulsion, or both" (Article XXV Section 1 of Grand Lodge Constitution). There is no penalty providing for an apology nor is there any fine authorized in excess of $50.00. (Section 8 of Article K). Nowhere do we find any provision empowering the International President to impose a penalty other than expulsion or "fine in excess of $50.00", unless the same is *first* approved by the Executive Council, which approval was not had in this case. It must be noted also that the International President regarded the action of Aug. 2, 1950, as a "reconsideration" of the action taken on July 19, 1950, rather than a motion "to rescind." (See Plaintiff's Exhibit No. 5). Conceding for sake of argu-

ment, that reconsideration of the action taken on July 19, 1950, would have been proper, such action should have been taken on July 19, 1950, and not on Aug. 2, 1950. Rules 24 and 25 of the Rules of Order of the Constitution for Local Lodges provide, respectively, as follows: "When a question has been decided it can be reconsidered by a majority vote *of those present* . . . A motion to reconsider must be made and seconded by two members who voted with the majority." It does not appear that this procedure was followed either on July 19th or on August 2nd.

The fact that in his decision and International President stated "that his decision would have been exactly the same regardless of the fact that the Lodge at its meeting on Aug. 2, 1950, reversed the decision made on July 19" does not alter the situation. This statement is apparently with reference to the appeal respondent Truax had taken on July 28, 1950, with reference to the action taken on July 19, 1950, which appeal Truax withdrew on Aug. 22, 1950, after the action taken on August 2, 1950, and after Petitioner's appeal filed on Aug. 15, 1950. The International President was not considering Truax's appeal, but that of Petitioner, which not only encompassed the findings of the Trial Committee but all the procedures of July 19 and Aug. 2, as well. Although the International President agreed with the findings of the Trial Committee and found that the same were based on substantial evidence, it was his duty as an appellate tribunal to reverse the Local Lodge upon the ground that the prescribed constitutional procedures had not been followed. If Truax had prosecuted his appeal, then the action of the International President in affirming the findings of the Trial Committee would have been regular, because then he would be reversing the Local Lodge as to the action it had taken on July 19, the procedures up to that time being legal. Of course, as stated above, the penalty as modified by him was not legal. What we have stated here with reference to the International President applies likewise to the Executive Committee which affirmed his decision.

When the Executive Committee affirmed the decision of the International President and the Local Lodge on February 11, 1952, advised petitioner that it would not continue to accept dues until the penalty fixed by the International President was complied with, the petitioner was deprived of rights and privileges in the union and in effect was suspended from membership (See Respondent's Exhibit E).

Petitioner was, by virtue of said action, prevented from working as a machinist and thereby sustained loss of wages. The petitioner was out of work from March 4, 1952, to June 26, 1953, when he became incapacitated because of illness. We have assessed the damages for said period to be in the sum of $6,800.00 at the rate of $100.00 per week, which, as testified by petitioner, was the lowest weekly wage received by him during the years 1950, 1951, and 1952. Had petitioner not been incapacitated by a disabling illness on June 26, 1953, which prevented him from engaging in any employment whatever, this Court would have been obliged to assesss damages on the above basis until the date of judgment. The award of damages for $2,500.00 for mental distress is proper, we believe, under the evidence and all the circumstances, and pursuant to the authority of Taylor v. Marine Cooks and Stewards, 117 CA (2d) 556. We did not award any exemplary damages because there is no evidence of malice or fraud on the part of respondents.

With respect to damages, the Court has made a further order to the effect that the trial court retains jurisdiction for the purpose of awarding such additional damages as might be suffered by petitioner until he is actually restored to his rights and privileges in the respondent associations and reinstated to membership therein.

The attorneys for petitioner are directed to prepare Findings of Fact and Conclusions of Law pursuant to the Minute Orders for a Writ of Mandate and for judgment

for damages heretofore made and pursuant to this memorandum.

Dated: June 7, 1954.

JOHN B. MOLINARI
Judge of the Superior Court

Filed in Open Court July 29, 1954
Martin Mongan, Clerk
By E. Wall, Deputy Clerk

APPENDIX "B"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 423147

MARCOS GONZALES, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ETC., *et al.,*
Respondents.

Judgment

The above entitled cause came on for trial before the Court sitting without a jury on the 25th day of August, 1953, and again on the 3rd day of February, 1954, and evidence having been received and memorandum of law having been thereafter submitted to the Court, and the cause submitted, and the Court having issued its memorandum of decision and having heretofore made and caused to be filed herein its written findings of fact and conclusions of law, and being fully advised,

WHEREFORE, by reason of the law and the findings of fact aforesaid, it is ORDERED, ADJUDGED AND DECREED that petitioner have and recover from the respondents, and each of them, the sum of Sixty-Eight Hundred Dollars

($6,800.00) as damages for lost wages and the sum of Twenty-Five Hundred Dollars ($2,500.00) as damages for grievous physical and mental pain and suffering, humiliation, anxiety and degradation, with interest thereon at the rate of SEVEN (7) per centum per annum from the date hereof until paid, together with petitioner's costs and disbursements incurred in said action amounting to the sum of $.

IT IS FURTHER ORDERED that a peremptory writ of mandate issue forthwith to respondents, and each of them, directing them to forthwith restore petitioner to all of his rights and privileges in the respondent associations and to forthwith reinstate petitioner as a member in good standing thereof, without payment of any fine or the statement of any apology or other condition.

IT IS FURTHER ORDERED that this Court retains continuing jurisdiction of this cause for the purpose of awarding additional damages or making further orders herein until this judgment and the said preemptory writ of mandate shall have been fully complied with.

DATED: July 29, 1954.

Judge of the Superior Court

Filed Feb. 16, 1956
Walter S. Chisholm, Clerk
By ....., Deputy

APPENDIX "C"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT DIVISION ONE

No. 16536

MARCOS GONZALES, *Petitioner and Respondent,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; THOMAS E. McSHANE, and A. C. McGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge, *Respondents and Appellants.*

Opinion

The superior court rendered judgment reinstating petitioner in the International Association of Machinists and awarding him $6800 damages for loss of wages and $2500 for mental distress. All respondents* in the lower court are appellants here.

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* They are the International Association of Machinists, an unincorporated association, Thomas E. McShane, and A. C. McGraw, as International Representatives thereof; International Association of Machinists, Local Lodge No. 68, an unincorporated association, Robert Roller, as President of said Local Lodge, Reese Conte, as Secretary of said Local Lodge, Edward Peck, as Treasurer of said Local Lodge.

QUESTIONS PRESENTED.

1. Was petitioner excused from exhausting his administrative remedies?

2. Did the lodge violate the constitutions of the organization?

3. Are the International President's interpretations binding on the courts?

4. Damages: Does the Labor Management Relations Act, 1947, 29 U.S.C. § 141 et seq. (Taft-Hartley Act) apply?

FACTS.

This proceeding grew out of the recommendation in 1948 by petitioner, as a member of the investigating committee of the lodge, that one Nelson be denied admission to membership. Thereafter petitioner was physically assaulted by Nelson. Petitioner, believing that the assault was instigated by Charles Truax, who was the International Representative, filed suit in the superior court against both Nelson and Truax for damages for injuries received in the assault. A nonsuit was granted in favor of Truax and a judgment in favor of petitioner against Nelson for $10,000. July 7, 1950, petitioner was tried by the trial committee of the lodge for violation of article XXV, section 1, Grand Lodge Constitution.* July 19th, the trial committee at the regular bi-monthly meeting submitted to the lodge its verdict—"guilty as charged," and its recommendation that petitioner be expelled from the association. Thereupon pursuant to article K, section 7

* ". . . any member . . . circulating or causing in any manner to be circulated any false or malicious statement . . . falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge . . ." The charges were preferred by Truax and were based upon the allegations in petitioner's complaint in the civil action that Truax directed and ordered Nelson to perpetrate the assault and battery on petitioner.

of the constitution, the membership present voted on the action of the committee.* The vote was 43-31 against sustaining the verdict.** August 2, 1950, at a regular meeting a motion was made to rescind the action of July 19th rejecting the verdict of the trial committee. A standing vote showed 38 yes, 4 no. Thereupon a secret ballot vote was taken on a motion to sustain the "guilty" verdict of the committee. This resulted in 31 yes, 12 no, 2 blank ballots. A secret ballot vote was then taken on a motion to expel petitioner from the association as recommended by the committee. This resulted in 29 yes, 14 no, 1 blank. August 2nd petitioner appealed to the International President from this action of the lodge, claiming among other things that the action of the lodge on August 2nd, after his vindication on July 19th, was a violation of the constitution, and also that the vote for his expulsion was not the required "two-thirds (⅔) vote of those voting." November 13th, the Industrial President sent a letter to the president and secretary of the lodge, in which he made formal findings, conclusions and decision. He upheld the conviction of petitioner, but decided that expulsion was too severe a penalty and then modified the penalty to a fine of $500 to be paid the lodge, and a "complete and appropriate apology" in writing from petitioner to Truax, copy thereof to be sent to the president. January 30, 1951, petitioner received a letter from the General Secretary-Treasurer of the International to the effect that on his appeal of the decision of the International President to the Executive Council that body had unanimously sustained the decision. "Accordingly, President Hayes' decision of November 13, fining you $500.00, becomes the decision

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* This provides that the recommendation of the committee may be amended, rejected, or another punishment substituted by a majority vote of those voting. To expel, however, the required vote is two-thirds of those voting.

** July 28, 1950, Truax appealed to the Grand Lodge from this action of the lodge. August 22nd, he withdrew his appeal.

of the Executive Council, and our records have been so indicated." February 23, 1951, in reply to a letter from petitioner, asking the course to be followed in appealing the decision of the Executive Council, the General Secretary-Treasurer wrote petitioner calling attention to section 6, article XXV, of the constitution* which provides for appeals to a convention of the Grand Lodge and stated that his appeal could not be sent to the convention nor considered by it "until you have carried out the decision of the Executive Council, which means you must pay the fine of $500.00 before you can appeal to the convention." February 11, 1952, the lodge's financial secretary notified petitioner that the lodge would no longer accept dues from him until he had complied with the president's decision by paying the $500 fine and making a complete and appropriate apology to Truax. February 20th, petitioner formally refused to pay the fine or make apology. December 3, 1952, petitioner filed his application for a writ of mandate in the superior court.

Whatever confusion there may have been in this state as to the right of a trade union member to appeal to the courts for redress from his union's action, without first exhausting all remedies provided by its constitution and by-laws, such confusion has been resolved and a definite rule established in the recently decided Holderby v. Internat. Union etc. Engrs., 45 A.C. 867. There the plaintiff was expelled from the union in complete violation of the union's constitution. In holding that he could not appeal to the courts without first availing himself of the remedies

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* Before any appeal can be taken to the convention or to the membership, at large by referendum, "all orders of the Executive Council in relation thereto, must be fully complied with . . . and in no case shall . . . any . . . member . . . appeal to the civil courts for redress until after having exhausted all rights of appeal under the provisions of this Constitution." Section 10, article K, constitution, likewise requires that a member of a local lodge must exhaust all rights of appeal under the constitution of both the Grand Lodge and the local lodge before appealing to the courts.

provided in the constitution for a review by the general board of the action taken against him, the court refused to follow cases like Weber v. Marine Cooks' & Stewards' Assn., 93 Cal. App. 2d 327, which had held that "where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeal to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal." (P. 338.) It then ruled that the union member must exhaust the union remedies before he may appeal to the courts, no matter what the initial violation of union rules may have been, and that the only exception to the general rule is if there has been a violation of the rules on appeal. "It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to invoke them that the further pursuit of internal relief is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts." (P. 871.) Therefore we are limited to a determination of whether the union rules on appeal were violated in any respect or whether further pursuit of internal relief is excused.

1. Administrative Remedy.

Petitioner followed his administrative remedy through an appeal to the International President and then from his decision to the Executive Council. He did not proceed with an appeal either to the convention of the Grand lodge or to the membership at large. He was barred from so doing by the requirement that he first fully comply with the orders of the Executive Council.

Petitioner contends that the International President and the Executive Council violated the union rules on appeal in deciding that the required two-thirds vote had expelled him and in changing the penalty from expulsion to a fine and apology. As to the finding of the president that there was a two-thirds vote in favor of expulsion,

such finding, if erroneous, could not alone justify noncompliance by petitioner with the appeal rules of the organization. Just as a court has the power to decide wrongly as rightly, the president on appeal likewise has such power and a wrong decision is not the violation of the organization's rules on appeal which under the Holderby case justifies the member to further follow the union's rules on appeal. The constitution provides (art. V, § 1) that the president shall decide all constitutional questions subject, however, to the right of appeal.* However, the imposition of an apology requirement would appear to be in a different category. Article XXV, section 1, the section which petitioner was charged with violating, provides a penalty of fine or expulsion, or both. That section is in the Grand Lodge Constitution. In the local lodge constitution (art. K, § 7) it is provided that the membership may substitute another punishment for that recommended by the trial committee. It is questionable whether this gives the membership the right to substitute any penalty other than that included in the phrase "fine or expulsion or both" in the penalty section of the Grand Lodge Constitution. However, we can find no authorization to the president, upon appeal, to change the penalty voted by the lodge. It would appear that his authority is either to affirm or reject the action of the lodge, and in the event he affirms its action in finding a member guilty but, as here, feels that the penalty is too great, he may reverse the penalty but the determination of the new penalty is for the lodge and not for him. It may be that had the

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* Nor do we think that the president violated any rules in prescribing a fine *prior to approval* thereof by the Executive Council. Section 8, article K, provides that no fine in excess of $50 "shall be imposed upon any member . . . unless the same is first approved by the Executive Council." Having in mind that under the appellate procedure an appeal is first to the president and thereafter to the Executive Council, and that this provision is in the constitution of the lodge and not in that of the Grand Lodge, it is obvious that it does not apply to a decision on appeal.

president merely reduced the penalty to a $500 fine, petitioner could not complain of a departure from the rules so obviously in his favor, as a fine is included in the penalties provided by the constitution. But the requirement of an apology is an entirely different matter. Nowhere is there a provision for such a penalty and it is completely outside the penalties prescribed. This action then constituted not only a violation of the organization's rules for appellate procedure but it brings the case under the second situation stated in the Holderby case, namely, "that it would be futile to invoke" the further appellate rules. They provide that to go further with his appeal petitioner must comply with all orders of the Executive Council. Thus to gain redress petitioner must pay a fine which the president and the Executive Council had no right to impose and to make an apology which neither had the right to require. While the fine money could be refunded if the convention were to reverse the Executive Council's decision, there is no way in which the apology could be wiped out. The effect of these requirements was to prevent petitioner from proceeding further and gave him the right to appeal to the courts for relief.

Appellants contend that the action of the Executive Council, in effect, eliminated the president's requirement of an apology. The General Secretary-Treasurer on January 30, 1951, notified petitioner: "Inasmuch as you failed to supplement your letter of November 16, the Executive Council, at its recent meeting, carefully appraised all of the facts as presented in the correspondence dealing with your case and, after due deliberation, *by unanimous action, voted to sustain the International President's decision.* Accordingly, President Hayes' decision of November 13, fining you $500.00, becomes the decision of the Executive Council . . ." (Emphasis added.) On February 23rd he notified petitioner that an appeal to the convention, if made, could not be "processed" "until you have carried out the decision of the Executive Council, which means

you must pay the fine of $500.00 before you can appeal to the convention." On February 11, 1952, the financial secretary of the lodge notified petitioner that the lodge could not accept dues from him until he paid the $500 fine *and made a complete and appropriate apology,* sending copy to the International President. "This is in accordance with the decision" of the president "and sustained by the Executive Council . . ." It is difficult to understand how the Executive Council "voted to sustain the International President's decision" if it deleted therefrom the apology requirement. Certainly the lodge interpreted the action of the Executive Council as requiring the apology as well as the fine. At the trial counsel for appellants stated: ". . . it is true that in order to comply with the decision of the International President that the Plaintiff would have to pay $500 and that we don't dispute that at all, and *it also appears that he would have to make an apology.*" (Emphasis added.) In any event, as a result of the appeal brought by petitioner, he finds himself ousted from his union because of nonpayment of dues, which he would pay but it will not receive, and denied his right of further appeal because he will not do something which the appellate bodies had no right to require him to do. It should be remembered that being ousted or expelled from a union is a matter of much greater consequence than expulsion from a fraternal organization. In the former case, in most instances it means a loss of a member's job, and therefore, his means of making a living. Especially is this so when employers of the type of labor provided by members of this organization only hire through the union hiring hall. At the very least, his no longer belonging to the union would be a serious handicap in the labor market.

The facts bring this case under the exception to the general rule of exhaustion of administrative remedy. We are therefore required to consider whether the acts of the lodge violated the constitution of either the Grand Lodge or the local lodge.

2. LODGE VIOLATIONS.

There is no provision in either constitution for rescinding the action of the membership in voting on the recommendations of a trial committee.* Appellants support such action, however, by contending that the procedure was in accordance with Robert's Rules of Order and that the constitutions make those rules applicable. Article G. section 2 of the local lodge constitution provides: "The Rules of Order governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply." In these rules there is nothing upon the subject with which we are here concerned. Article II, section 11 of the Grand Lodge Constitution makes Robert's Rules of Order the parliamentary law of both the Grand Lodge and the local lodge, "except in cases otherwise provided for by this Constitution." If there is any conflict between Robert's Rules and the provisions of either constitution the latter must necessarily prevail. (See Harris v. Nat. Union etc. Cooks & Stewards, 98 Cal. App. 2d 733, 736.) The lodge constitution requires that voting on the recommendations of the trial committee be by secret ballot. It would seem to conflict with this requirement to permit a vote to rescind such action to be taken in a less formal way. Here it was taken by a standing vote. At the very least this violated the spirit of the constitution. Moreover, Robert's Rules provide (§ 10, subd. 5, p. 50, Robert's Rules of Order Revised Seventy-fifth Anniversary Edition): "At any future session, the resolution, or other main motion, may be rescinded *in the same way if it had been adopted;* . . ." (Emphasis added.) The action taken here violated that provision. We hold that attempting to rescind an action required to be taken by a secret vote, by a standing vote, is a violation of the constitution and of the rules and was therefore void.

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* Truax having appealed to the president from the action taken on July 19th, it is very doubtful if the membership under any theory could modify or rescind the action which was then on appeal.

The action of rescission was taken in petitioner's absence. Ellis v. American Federation of Labor, 48 Cal. App. 2d 440, holds (pp. 443-444): "It is settled however in this state and elsewhere that a member of an unincorporated association may not be suspended or expelled, nor a subordinate body suspended or its charter revoked, without charges, notice and a hearing, even though the rules of the association make no provision therefor." While petitioner had notice of the proceedings up to the action exonerating him on July 19th, the action purported to be taken on August 2nd was taken without notice and in his absence. The above mentioned rule would apply to such action. Such action violated "those rudimentary rights which will give him a reasonable opportunity to defend against the charges made. . . . The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor." (Carson v. Glass Bottle Blowers Assn., 37 Cal. 2d 134, 143.)

Moreover, the vote on the question of expulsion did not produce the required "two thirds (⅔) vote of those voting." There were 29 yes votes, 14 noes and 1 blank, cast, or a total of 44 votes. The casting of a blank ballot is voting. To constitute a two-thirds vote of those voting it was necessary to get 30 votes. As only 29 affirmative votes were cast the measure failed and the attempted expulsion cannot stand.*

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* While the trial court found that the action of petitioner in charging Truax in the civil action with directing and ordering Nelson to assault him violated article XXV, section 1, "falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge" (Truax was such an officer) we deem it unnecessary to consider this finding for the reason that the action of the membership on July 19th in rejecting the trial committee's finding, the matter has become academic.

3. PRESIDENT'S INTERPRETATION.

Appellants contend that the president's interpretation of the constitutions as giving him the power to impose the fine and apology, in holding the rescinding action of the lodge as proper, and in determining that the blank ballot should not be counted in determining the votes cast, is binding upon the courts. This contention is based upon the rule set forth in DeMille v. American Fed. of Radio Artists, 31 Cal. 2d 139, 147: "The practical and reasonable construction of the constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." But the construction placed upon such actions by the president in this case cannot be held to be reasonable under the circumstances. "A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning." (Harris v. Nat. Union etc. Cooks & Stewards, supra, 98 Cal. App. 2d 733, 737; see also Mandracio v. Bartenders Union, Local 41, 41 Cal. 2d 81, 85; Riviello v. Journeyman Barbers etc. Union, 109 Cal. App. 2d 123, 128-129.)

We are not impressed by the fact that the president stated in effect that his conclusion would not have been different if he were considering Truax' appeal from the first action of the lodge rather than petitioner's appeal from its second action. It is only the latter situation with which we have to deal.

4. DAMAGES: JURISDICTION.

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: PROVIDED, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership*

therein; . . ." (29 U.S.C. § 158; emphasis added.) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in Mahoney v. Sailors' Union of the Pacific (Wash., 1954) 275 P. 2d 440, improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also Real v. Curran, 138 N.Y.S. 2d 809.) But a different situation results when the member seeks damages as a result of such expulsion. The courts hold that the act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through "the procedures followed by the union whereby employers were caused to discriminate against" such members (idem, p. 444); such procedures constitute an unfair labor practice. There are many cases holding it to be an unfair labor practice for the union in any way to cause an employer to fail to employ the discharged member. Among others are Born v. Laube, 213 F. 2d 407, cert. den. Oct. 18, 1954, 348 U.S. 855; Radio Officers' Union, etc. v. National L. R. Bd., 347 U.S. 17, 74 S. Ct. 323; Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S. Ct. 480. There are three cases, almost identical in this respect with the one at bar, in which the union after improperly expelling the member, took no active steps to notify the employer not to employ him, but, as here, merely refused to issue the employee a hiring hall card or to dispatch him to the job. In each of those cases it was held that such action constituted an "attempt to cause an employer . . . to discriminate against" the employee (29 U.S.C. § 158), and therefore was an unfair labor practice as to which Congress had given the Labor Relations Board exclusive jurisdiction. (Mahoney v. Sailors' Union of the Pacific, supra, 275 P. 2d 440; Sterling v. Local 438, etc., (Md., 1955) 113 A. 2d 389; Real v. Curran, supra, 138 N.Y.S. 2d 809.) In the latter case the court said (p. 812): "If the union caused or attempted to

cause plaintiff's discharge from his existing employment with the United States Lines, as is alleged—*either by hiring procedures*, or by causing union members not to work with him—it has committed an unfair labor practice within the contemplation of the section, and the National Labor Relations Board can direct the union to cease and desist from such conduct." (Emphasis added.)

As said in Real v. Curran, supra, 138 N.Y.S. 2d 809, 813-814, the illegal expulsion of a member from the union does not constitute an unfair labor practice as such and therefore "the Board cannot restore plaintiff's union membership because its power to direct affirmative action is dependent upon its finding of an unfair labor practice. . . . It is the causing or attempting to cause the employer to discriminate against an employee . . . that brings the Board's power into play . . . It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union."

Because the withholding from petitioner of the required card to obtain employment and the refusal of the union's dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages by the trial court was beyond the jurisdiction of the court and must be reversed.

Those portions of the judgment awarding petitioner damages are reversed. In all other respects the judgment is affirmed. Petitioner will recover costs.

BRAY, *J.*

WE CONCUR:

PETERS, *P.J.*
FRED B. WOOD, *J.*

Filed June 12, 1956

APPENDIX "D"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

No. 16536

MARCOS GONZALES, *Petitioner and Respondent,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; THOMAS E. MCSHANE, and A. C. MCGRAW, as International Representatives thereof; INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 68, an unincorporated association; ROBERT ROLLER, as President of said Local Lodge; REESE CONTE, as Secretary of said Local Lodge; EDWARD PECK, as Treasurer of said Local Lodge,

Respondents and Appellants.

Opinion

The superior court rendered judgment reinstating petitioner in the International Association of Machinists and awarding him $6800 damages for loss of wages and $2500 for mental distress. All respondents* in the lower court are appellants here.

QUESTIONS PRESENTED.

1. Was petitioner excused from exhausting his administrative remedies?

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* They are the International Association of Machinists, an unincorporated association, Thomas E. McShane, and A. C. McGraw, as International Representatives thereof; International Association of Machinists, Local Lodge No. 68, an unincorporated association, Robert Roller, as President of said Local Lodge, Reese Conte, as Secretary of said Local Lodge, Edward Peck, as Treasurer of said Local Lodge.

2. Did the lodge violate the constitutions of the organization?

3. Are the International President's interpretations binding on the courts?

4. Damages: (a) Does the Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq. (Taft-Hartley Act) apply? (b) Is the award supported?

FACTS.

This proceeding grew out of the recommendation in 1948 by petitioner, as a member of the investigating committee of the lodge, that one Nelson be denied admission to membership. Thereafter petitioner was physically assaulted by Nelson. Petitioner, believing that the assault was instigated by Charles Truax, who was the International Representative, filed suit in the superior court against both Nelson and Truax for damages for injuries received in the assault. A nonsuit was granted in favor of Truax and a judgment in favor of petitioner against Nelson for $10,000. July 7, 1950, petitioner was tried by the trial committee of the lodge for violation of article XXV, section 1, Grand Lodge Constitution.* July 19th, the trial committee at the regular bi-monthly meeting submitted to the lodge its verdict—"guilty as charged," and its recommendation that petitioner be expelled from the association. Thereupon pursuant to article K, section 7 of the constitution, the membership present voted on the action of the

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* ". . . any member . . . circulating or causing in any manner to be circulated any false or malicious statement . . . falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge . . ." The charges were preferred by Truax and were based upon the allegations in petitioner's complaint in the civil action that Truax directed and ordered Nelson to perpetrate the assault and battery on petitioner.

committee.* The vote was 43-31 against sustaining the verdict.** August 2, 1950, at a regular meeting a motion was made to rescind the action of July 19th rejecting the verdict of the trial committee. A standing vote showed 38 yes, 4 no. Thereupon a secret ballot vote was taken on a motion to sustain the "guilty" verdict of the committee. This resulted in 31 yes, 12 no, 2 blank ballots. A secret ballot vote was then taken on a motion to expel petitioner from the association as recommended by the committee. This resulted in 29 yes, 14 no, 1 blank. August 2nd petitioner appealed to the International President from this action of the lodge, claiming among other things that the action of the lodge on August 2nd, after his vindication on July 19th, was a violation of the constitution, and also that the vote for his expulsion was not the required "two-thirds (⅔) vote of those voting." November 13th, the International President sent a letter to the president and secretary of the lodge, in which he made formal findings, conclusions and decision. He upheld the conviction of petitioner, but decided that expulsion was too severe a penalty and then modified the penalty to a fine of $500 to be paid the lodge, and a "complete and appropriate apology" in writing from petitioner to Truax, copy thereof to be sent to the president. January 30, 1951, petitioner received a letter from the General Secretary-Treasurer of the International to the effect that on his appeal of the decision of the International President to the Executive Council that body had unanimously sustained the decision. "Accordingly, President Hayes' decision of November 13, fining you $500.00, becomes the decision of the Executive Council, and our records have been so

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* This provides that the recommendation of the committee may be amended, rejected, or another punishment substituted by a majority vote of those voting. To expel, however, the required vote is two-thirds of those voting.

** July 28, 1950, Truax appealed to the Grand Lodge from this action of the lodge. August 22nd, he withdrew his appeal.

indicated." February 23, 1951, in reply to a letter from petitioner, asking the course to be followed in appealing the decision of the Executive Council, the General Secretary-Treasurer wrote petitioner calling attention to section 6, article XXV, of the constitution* which provides for appeals to a convention of the Grand Lodge and stated that his appeal could not be sent to the convention nor considered by if "until you have carried out the decision of the Executive Council, which means you must pay the fine of $500.00 before you can appeal to the convention." February 11, 1952, the lodge's financial secretary notified petitioner that the lodge would no longer accept dues from him until he had complied with the president's decision by paying the $500 fine and making a complete and appropriate apology to Truax. February 20th, petitioner formally refused to pay the fine or make apology. December 3, 1952, petitioner filed his application for a writ of mandate in the superior court.

Whatever confusion there may have been in this state as to the right of a trade union member to appeal to the courts for redress from his union's action, without first exhausting all remedies provided by its constitution and by-laws, such confusion has been resolved and a definite rule established in the recently decided Holderby v. Internat. Union etc. Engrs., 45 Cal. 2d 843 [291 P. 2d 463]. There the plaintiff was expelled from the union in complete violation of the union's constitution. In holding that he could not appeal to the courts without first availing himself of the remedies provided in the constitution for a

* Before any appeal can be taken to the convention or to the membership, at large by referendum, "all orders of the Executive Council in relation thereto, must be fully complied with . . . and in no case shall . . . any . . . member . . . appeal to the civil courts for redress until after having exhausted all rights of appeal under the provisions of this Constitution." Section 10, article K, constitution, likewise requires that a member of a local lodge must exhaust all rights of appeal under the constitution of both the Grand Lodge and the local lodge before appealing to the courts.

review by the general board of the action taken against him, the court refused to follow cases like Weber v. Marine Cooks' & Stewards' Assn., 93 Cal. App. 2d 327 [208 P. 2d 1009], which had held that "where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeal to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal." (P. 338.) It then ruled that the union member must exhaust the union remedies before he may appeal to the courts, no matter what the initial violation of union rules may have been, and that the only exception to the general rule is if there has been a violation of the rules on appeal. "It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to invoke them that the further pursuit of internal relief is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts." (P. 849). Therefore we are limited to a determination of whether the union rules on appeal were violated in any respect or whether further pursuit of internal relief is excused.

1. Administrative Remedy.

Petitioner followed his administrative remedy through an appeal to the International President and then from his decision to the Executive Council. He did not proceed with an appeal either to the convention of the Grand Lodge or to the membership at large. He was barred from so doing by the requirement that he first fully comply with the orders of the Executive Council.

Petitioner contends that the International President and the Executive Council violated the union rules on appeal in deciding that the required two-thirds vote had expelled him and in changing the penalty from expulsion to a fine and apology. As to the finding of the president that there was a two-thirds vote in favor of expulsion,

such finding, if erroneous, could not alone justify noncompliance by petitioner with the appeal rules of the organization. Just as a court has the power to decide wrongly as well as rightly, the president on appeal likewise has such power and a wrong decision is not the violation of the organization's rules on appeal which under the Holderby case justifies the member in refusing to further follow the union's rules on appeal. The constitution provides (art. V, § 1) that the president shall decide all constitutional questions subject, however, to the right of appeal.* However, the imposition of an apology requirement would appear to be in a different category. Article XXV, section 1, the section which petitioner was charged with violating, provides a penalty of fine or expulsion, or both. That section is in the Grand Lodge Constitution. In the local lodge constitution (art. K, § 7) it is provided that the membership may substitute another punishment for that recommended by the trial committee. It is questionable whether this gives the membership the right to substitute any penalty other than that included in the phrase "fine or expulsion or both" in the penalty section of the Grand Lodge Constitution. However, we can find no authorization to the president, upon appeal, to change the penalty voted by the lodge. It would appear that his authority is either to affirm or reject the action of the lodge, and in the event he affirms its action in finding a member guilty but, as here, feels that the penalty is too great, he may reverse the penalty but the determination of the new penalty is for the lodge and not for him. It

* Nor do we think that the president violated any rules in prescribing a fine *prior to approval* thereof by the Executive Council. Section 8, article K, provides that no fine in excess of $50 "shall be imposed upon any member . . . unless the same is first approved by the Executive Council." Having in mind that under the appellate procedure an appeal is first to the president and thereafter to the Executive Council, and that this provision is in the constitution of the lodge and not in that of the Grand Lodge, it is obvious that it does not apply to a decision on appeal.

may be that had the president merely reduced the penalty to a $500 fine, petitioner could not complain of a departure from the rules so obviously in his favor, as a fine is included in the penalties provided by the constitution. But the requirement of an apology is an entirely different matter. Nowhere is there a provision for such a penalty and it is completely outside the penalties prescribed. This action then constituted not only a violation of the organization's rules for appellate procedure but it brings the case under the second situation stated in the Holderby case, namely, "that it would be futile to invoke" the further appellate rules. They provide that to go further with his appeal petitioner must comply with all orders of the Executive Council. Thus to gain redress petitioner must pay a fine which the president and the Executive Council had no right to impose and to make an apology which neither had the right to require. While the fine money could be refunded if the convention were to reverse the Executive Council's decision, there is no way in which the apology could be wiped out. The effect of these requirements was to prevent petitioner from proceeding further and gave him the right to appeal to the courts for relief.

Appellants contend that the action of the Executive Council, in effect, eliminated the president's requirement of an apology. The General Secretary-Treasurer on January 30, 1951, notified petitioner: "Inasmuch as you failed to supplement your letter of November 16, the Executive Council, at its recent meeting, carefully appraised all of the facts as presented in the correspondence dealing with your case and, after due deliberation, *by unanimous action, voted to sustain the International President's decision.* Accordingly, President Hayes' decision of November 13, fining you $500.00, becomes the decision of the Executive Council . . ." (Emphasis added.) On February 23rd he notified petitioner that an appeal to the convention, if made, could not be "processed" "until you have carried out the decision of the Executive Council, which means you must

pay the fine of $500.00 before you can appeal to the convention." On February 11, 1952, the financial secretary of the lodge notified petitioner that the lodge could not accept dues from him until he paid the $500 fine *and made a complete and appropriate apology,* sending copy to the International President. "This is in accordance with the decision" of the president "and sustained by the Executive Council . . ." It is difficult to understand how the Executive Council "voted to sustain the International President's decision" if it deleted therefrom the apology requirement. Certainly the lodge interpreted the action of the Executive Council as requiring the apology as well as the fine. At the trial counsel for appellants stated: ". . . it is true that in order to comply with the decision of the International President that the Plaintiff would have to pay $500 and that we don't dispute that at all, and *it also appears that he would have to make an apology.*" (Emphasis added.) In any event, as a result of the appeal brought by petitioner, he finds himself ousted from his union because of nonpayment of dues, which he would pay but it will not receive, and denied his right of further appeal because he will not do something which the appellate bodies had no right to require him to do. It should be remembered that being ousted or expelled from a union is a matter of much greater consequence than expulsion from a fraternal organization. In the former case, in most instances it means a loss of a member's job, and therefore, his means of making a living. Especially is this so when employers of the type of labor provided by members of this organization only hire through the union hiring hall. At the very least, his no longer belonging to the union would be a serious handicap in the labor market.

The facts bring this case under the exception to the general rule of exhaustion of administrative remedy. We are therefore required to consider whether the acts of the lodge violated the constitution of either the Grand Lodge or the local lodge.

2. Lodge Violations.

There is no provision in either constitution for rescinding the action of the membership in voting on the recommendations of a trial committee.* Appellants support such action, however, by contending that the procedure was in accordance with Robert's Rules of Order and that the constitutions make those rules applicable. Article G, section 2 of the local lodge constitution provides: "The Rules of Order governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply." In these rules there is nothing upon the subject with which we are here concerned. Article II, section 11 of the Grand Lodge Constitution makes Robert's Rules of Order the parliamentary law of both the Grand Lodge and the local lodge, "except in cases otherwise provided for by this Constitution." If there is any conflict between Robert's Rules and the provisions of either constitution the latter must necessarily prevail. (See Harris v. Nat. Union etc. Cooks & Stewards, 98 Cal. App. 2d 733, 736 [221 P. 2d 136].) The lodge constitution requires that voting on the recommendations of the trial committee be by secret ballot. It would seem to conflict with this requirement to permit a vote to rescind such action to be taken in a less formal way. Here it was taken by a standing vote. At the very least this violated the spirit of the constitution. Moreover, Robert's Rules provide (§ 10, subd. 5, p. 50, Robert's Rules of Order Revised Seventy-fifth Anniversary Edition): "At any future session, the resolution, or other main motion, may be rescinded *in the same way if it had been adopted;* . . ." (Emphasis added.) The action taken here violated that provision. We hold that attempting to rescind an action required to be taken by a secret vote, by a standing

* Truax having appealed to the president from the action taken on July 19th, it is very doubtful if the membership under any theory could modify or rescind the action which was then on appeal.

vote, is a violation of the constitution and of the rules and was therefore void.

The action of rescission was taken in petitioner's absence. Ellis v. American Federation of Labor, 48 Cal. App. 2d 440 [120 P. 2d 79] holds (pp. 443-444): "It is settled however in this state and elsewhere that a member of an unincorporated association may not be suspended or expelled, nor a subordinate body suspended or its charter revoked, without charges, notice and a hearing, even though the rules of the association make no provision therefor." While petitioner had notice of the proceedings up to the action exonerating him on July 19th, the action purported to be taken on August 2nd was taken without notice and in his absence. The above mentioned rule would apply to such action. Such action violated "those rudimentary rights which will give him a reasonable opportunity to defend against the charges made. . . . The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor." (Cason v. Glass Bottle Blowers Assn., 37 Cal. 2d 134, 143 [231 P. 2d 6].)

Moreover, the vote on the question of expulsion did not produce the required "two thirds (⅔) vote of those voting." There were 29 yes votes, 14 noes and 1 blank, cast, or a total of 44 votes. The casting of a blank ballot is voting. To constitute a two-thirds vote of those voting it was necessary to get 30 votes. As only 29 affirmative votes were cast the measure failed and the attempted expulsion cannot stand.*

* While the trial court found that the action of petitioner in charging Truax in the civil action with directing and ordering Nelson to assault him violated article XXV, section 1, "falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge" (Truax

3. PRESIDENT'S INTERPRETATION.

Appellants contend that the president's interpretation of the constitutions as giving him the power to impose the fine and apology, in holding the rescinding action of the lodge as proper, and in determining that the blank ballot should not be counted in determining the votes cast, is binding upon the courts. This contention is based upon the rule set forth in DeMille v. American Fed. of Radio Artists, 31 Cal. 2d 139, 147 [187 P. 2d 769, 175 A.L.R. 382]: "The practical and reasonable construction of the constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." But the construction placed upon such actions by the president in this case cannot be held to be reasonable under the circumstances. "A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning." (Harris v. Nat. Union etc. Cooks & Stewards, supra, 98 Cal. App. 2d 733, 737; see also Mandracio v. Bartenders Union, Local 41, 41 Cal. 2d 81, 85 [256 P. 2d 927]; Riviello v. Journeyman Barbers etc. Union, 109 Cal. App. 2d 123, 128-129 [240 P. 2d 361].)

We are not impressed by the fact that the president stated in effect that his conclusion would not have been different if he were considering Truax' appeal from the first action of the lodge rather than petitioner's appeal from its second action. It is only the latter situation with which we have to deal.

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was such an officer) we deem it unnecessary to consider this finding for the reason that by the action of the membership on July 19th in rejecting the trial committee's finding, the matter has become academic.

4. DAMAGES: (a) *Jurisdiction.*

In determining the question of whether the exclusive jurisdiction to grant damages in a case of this kind lies in the Labor Relations Board, it is first necessary to determine the character of the pleadings and issues in this case. The petition alleged a breach of contract between the union and plaintiff, one of its members.* It took the form of a petition for writ of mandate because damages alone would not be adequate to restore to petitioner the things of value he had lost by reason of the breach. No charge of "unfair labor practices" appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence adduced at the trial showed that plaintiff, because of his loss of membership, was unable to obtain employment and was thereby damaged. However, this damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract. Thus the question of unfair labor practice was not raised nor was any finding on the subject requested of, or made by, the court.

So far as plaintiff's improper expulsion from the union is concerned, there could be no question of unfair labor practice.

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: PROVIDED, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;* . . ." (29 U.S.C.A. § 158; emphasis added.) In

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* See Harris v. Nat. Union etc. Cooks & Stewards, supra, 98 Cal. App. 2d at p. 736: "The constitution of the union constitutes a contract with the members . . ."

construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in Mahoney v. Sailors' Union of the Pacific, (1954) 45 Wn. 2d 453 [275 P. 2d 440], improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also Real v. Curran, 285 App. Div. 552 [138 N.Y.S. 2d 809].)

So far as the award of damages is concerned, it was awarded not for an unfair labor practice, but for breach of contract and as incidental to the restoration to plaintiff of his right of membership. The contention that the Labor Relations Board has sole jurisdiction of the question of damages in a case of this kind was made and answered in Taylor v. Marine Cooks & Stewards Assn., 117 Cal. App. 2d 556, 564: "Appellants argue that these disputes are solely cognizable by the National Labor Relations Board under the Taft-Hartley Act. (29 U.S.C.A. § 158 (b) 2.) The damages suffered by respondents were an incident of the wrongful act of appellant union in taking disciplinary action against them in a manner which was violative of their rights under the constitution of the union. Nowhere in the Taft-Hartley Act is the N.L.R.B. given jurisdiction or authority to review the legality of any disciplinary action taken by a union against one of its members or to order a member's reinstatement in the union or to award damages resulting from his wrongful expulsion. These powers are left in the courts of law where they have always resided. We find nothing in the Taft-Hartley Act to deprive a court of the power to do complete justice between a wrongfully disciplined member and his union by allowing such damages as he may have suffered as an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived."

There are many cases holding it to be an unfair labor practice for a union in any way to cause an employer to fail to employ an expelled member (whether the expulsion be proper or improper), and that the National Labor Relations Act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through the procedures followed by the union whereby employers were caused to discriminate against such members. (Real v. Curran, supra, 138 N.Y.S. 2d 809.)* But in all those cases the *charge was made that the acts of the union constituted unfair labor practices and such charge was an issue in each case.* As we have pointed out it was not an issue here. In Weber v. Anheuser-Busch, Inc., supra, 348 U.S. 468, where the issue was whether the unions were guilty of unfair labor practices the court must have had this very distinction in mind for after referring to the "delicate problem of the interplay between state and federal jurisdiction touching labor relations" (p. 474) and after stating (p. 480) "the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much'" (quoting from Garner v. Teamsters Union, 346 U.S. 485, 488) it prefaced its conclusion that the state court did not have jurisdiction of the unfair labor practices charged, as follows: ". . . *where the moving party itself alleges unfair labor practices* . . ." (P. 481; emphasis added.) In United Workers v. Laburnum Corp., 347 U.S. 656, the court held that the National Labor Relations Act did not give such exclusive jurisdiction to the National Labor Relations Board as to deprive a Virginia state court of jurisdiction to try a common law tort action brought by a construction company against a union even though

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* Among other cases are: Born v. Laube, 213 F. 2d 407, cert. den. Oct 18, 1954, 348 U.S. 855; Radio Officers v. Labor Board, 347 U.S. 17; Weber v. Anheuser-Busch, Inc., 348 U.S. 468; Mahoney v. Sailors Union of the Pacific, supra, 275 P. 2d 440; Sterling v. Local 438, etc. (Md., 1955) 113 A. 2d 389.

the United States Supreme Court assumed the conduct constituted an unfair labor practice under the act.*

In Real v. Curran, supra, 138 N.Y.S. 2d 809, where a member allegedly was illegally expelled from his union, the court held that the Labor Relations Board could only act where there was an unfair labor practice, that improperly expelling the member did not constitute such practice and hence the board had no power to restore his union membership. Therefore it held that there was nothing in the Labor Relations Act which would affect the law which had long existed in New York that a wrongfully expelled member of a labor union was entitled to restoration by the state courts to union membership and "in a proper case, damages for consequent loss of wages." (P. 811.) "It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union." (P. 814.)

In International Union, etc. v. Hinz, 218 F. 2d 664 (U.S. Ct. of Appeals, 6th Cir., 1955) the plaintiff sued the union in the state court of Michigan for damages (not for reinstatement in the union) charging that his union membership had been wrongfully terminated, and asking both compensatory and exemplary damages for loss of wages, etc. The union filed a complaint in the U.S. District Court praying for an injunction against the prosecution of said suit in the state court. In upholding the action of the District Court in dismissing this complaint, the reviewing court held: "Appellee's work did not cease as a consequence of a current labor dispute nor because of an unfair labor practice." (P. 665.) "The Board has no jurisdiction in disputes between a union and its

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* It is significant that there, as here, the trial court made no finding that the acts in question did constitute unfair labor practices.

members nor authority over the internal operation of a union." (P. 665. See also Amalgamated Clothing Workers of America v. Richmond Bros. Co. (6 Cir.) 211 F. 2d 449, and International Union of Electrical, Radio and Machine Workers, C.I.O. v. Underwood Corp., 219 F. 2d 100.)

In Holderby v. International Union etc. Engrs., supra, 45 Cal. 2d 843, the plaintiff filed an action in which he sought and obtained reinstatement as a member in good standing in the union and damages resulting from his alleged unlawful exclusion therefrom. While the Supreme Court reversed the judgment on the ground of the plaintiff's failure to exhaust his administrative remedy, it is interesting to note that the court nowhere intimates that it did not have jurisdiction of the subject matter of the action. Likewise in Weber v. Marine Cooks' & Stewards' Assn., 123 Cal. App. 2d 328, the plaintiff sued for reinstatement in his union after an alleged wrongful expulsion and for damages in the loss of wages and for mental suffering (just as plaintiff did here). The trial court granted a motion for nonsuit on the ground of laches alone. The reviewing court reversed the judgment and sent the case back for trial. It evidently had no doubt concerning its jurisdiction.

The language of William J. Isaacson in his article, "Labor Relations Law: Federal versus State Jurisdiction," appearing in the May, 1956, American Bar Association Journal (vol. 42, No. 5, p. 415) is applicable here. After calling attention to the fact that there is a conflict between the courts, both state and federal, which have considered the question here involved, and that the United States Supreme Court has not passed upon it, and then referring to Real v. Curran, supra, 138 N.Y.S. 2d 809, and Mahoney v. Sailors' Union of the Pacific, supra, 275 P. 2d 440, the article then states (p. 483): "Although even these state court decisions may lead to possible con-

flict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms."

DAMAGES: (b) *Award.*

Appellants contend that there is no evidence to support the award of $6800 damages for loss of wages.* Petitioner testified that his earnings were nearly always $100 per week at least, and frequently between that figure and $200. At the time of his expulsion from the union he was employed as a marine machinist by the General Electric Company. About four days thereafter he was injured on the job, incapacitated approximately three weeks. The ordinary practice was for employers to telephone the union hall for men, and the union members would be dispatched to the work. Thereafter he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work directly from the employers but without success. Although there was some testimony to the effect that the union might dispatch a nonmember to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would

*They apparently do not claim the evidence is insufficient to support the award of $2500 for mental distress.

not have been dispatched even if he had such letter. There was ample evidence to support the award.

The judgment is affirmed.

BRAY, J.

WE CONCUR:

PETERS, P. J.

FRED B. WOOD, J.

APPENDIX "E"

Allegation from Paragraph XV of the Original Petition for Writ of Mandate (Clerk's Tr. 9)

"XV

From and after March 5, 1952, your petitioner has been unable to secure employment in his former occupation, solely by reason of the illegal, wrongful and improper expulsion and punishment of petitioner by respondent associations . . ."

APPENDIX "F"

Allegations from Petitioners' Original Answer (Clerk's Tr. 26)

"AS AND FOR THE FURTHER AND SEPARATE ANSWER TO SAID PETITION, RESPONDENTS ALLEGE

I.

That the plain, speedy and adequate remedy in the ordinary course of law is available to the petitioner under the provisions of Section 8 (b) (1) and 8 (b) (2) of the National Labor Relations Act as amended."

APPENDIX "G"

Paragraph XII of Finding of Fact (Clerk's Tr. 49)

"XII

It is true that from March 4, 1952, to June 26, 1953, petitioner has been unable to secure employment at his former occupation solely by reason of the purported expulsion of petitioner from respondent associations. It is true that by reason of petitioner's purported expulsion and as a proximate result thereof, petitioner was caused to and did suffer physical and mental pain and suffering, humiliation and anxiety. It is true that after June 26, 1953, and to the date of trial, petitioner was incapacitated for work because of illness."

APPENDIX "H"

Paragraph V of Conclusions of Law (Clerk's Tr. 52)

V

That by reason of the purported expulsion of petitioner by respondents, and each of them, petitioner sustained wage loss in the sum of $6,800 up to the date of his incapacitating illness. That unless and until he is restored to his rights and privileges in the respondent associations and reinstated to membership therein, he may suffer further damages by way of wage loss and otherwise, and this Court has continuing jurisdiction to award such further damages as may in the future be suffered by petitioner until he is actually restored and reinstated as aforesaid.

APPENDIX "I"

Page 29 of Petitioners' Exhibit 9 (trial court designation) being a portion of a collective bargaining agreement which indicates National Labor Relations Board certification of employers involved

APPENDIX "A"

The following employees were named in a certification of representatives in NLRB case No. 20-RC-1275.

San Francisco California Bay Area Port

Colberg Boat Works
Columbia Machine Works
Fulton Shipyard
DeLano Bros. Co.
Hyet & Struck Engineering Co.
George W. Kneass Company
*Madden & Lewis
Martinolich Ship Repair Co.
*Pacific Ship Repair, Inc.
*Sausalito Shipbuilding Company
*Stephens Brothers, Inc.
*Thomas A. Short Co.
*Thomson Machine Works Co.
Triple A Machine Shop, Inc.
Wagner & Niehaus General Machine Shop
*West Winds, Inc.
Western Engineering

APPENDIX "J"

Statute Involved

Labor-Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C., 151 *et seq.* provides in pertinent parts as follows:

SECTION 2(7). The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a

labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * *

RIGHTS OF EMPLOYEES

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * * * *

UNFAIR LABOR PRACTICES

SECTION 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SECTION 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means or adjustment or prevention that has been or may be established by agreement, law, or otherwise; * * *